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Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

JACK WILLIAM TOCCO and ANTHONY CORRADO,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

I. Whether the Double Jeopardy Clause bars the government from continuing to prosecute criminal forfeiture claims for which a trier of fact has previously held the government has not satisfied its burden of proof?

RULE 14.1 STATEMENT

Pursuant to Rule 14.1(b) of the Rules of this Court, petitioner hereby provide the following names of the parties to this proceeding whose names do not appear on the caption:

Paul Corrado, defendant;

Vitol Giacalone, defendant;

Nove Tocco, defendant.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit (App., infra, 1-29) is reported at 227 F.3d 543 (6th Cir. 2000), and the opinion of the Sixth Circuit denying rehearing is reported at 286 F.3d 934 (6th Cir. 2002) App., infra, 30-39. The opinion of the District Court, sitting as trier of fact, is reproduced at App. 40-53.

JURISDICTION

The judgment of the Sixth Circuit Court of Appeals was entered on September 27, 2000. A petition for rehearing was denied on April 15, 2002, and a petition for a writ of certiorari is accordingly due on July 15, 2002. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part that "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb."

The "Criminal penalties" provisions of the Racketeer and Corrupt Organizations Act (RICO), 18 U.S.C. § 1963 provide in pertinent part that "Whoever violates any provision of section 1962 shall be fined . . . or imprisoned, . . . or both, and shall forfeit to the United States . . . (3) any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from

racketeering activity . . . in violation of section 1962. The court, in imposing sentence on such person shall order, in addition to any other sentence imposed pursuant to this section, that the person forfeit to the United States all property described in this subsection."

STATEMENT

This case involves a legal issue that has divided circuit courts and appears to raise a conflict between prior opinions of this Court: whether the Double Jeopardy Clause bars the government from appealing or relitigating criminal forfeiture claims of the government that have been rejected by a trier of fact for insufficient evidence.

In 1998, petitioners Jack Tocco and Anthony Corrado were convicted after a lengthy trial in the United States District Court for the Eastern District of Michigan of two counts of engaging in a RICO conspiracy involving sports gambling in Detroit, allegedly as part of the Detroit Mafia.[1] The parties then agreed that the trial court would be the trier of fact for the government's forfeiture claims. After resting upon the existing trial record, the government moved for a total of approximately $7.7 million in criminal forfeitures.

Specifically, the government sought four types of forfeiture:

(1) $4 million allegedly representing so-called "weekly draws" of monies of between $700 to

[1] Mr. Tocco was acquitted of all other offenses charged against him.

$1,000 per enterprise member over thirty (30) years;

(2) $1 million allegedly representing annual "Christmas bonuses" received by defendants Jack Tocco, Vito Giacalone, and Tony Corrado over the same time period;

(3) $3.2 million allegedly representing the value of unidentified members of the enterprise in two Nevada gaming hotels during the 1960's or early 1980's; and

(4) $242,100 allegedly representing collections of unlawful debts by defendants Nove, Tocco, and Paul Corrado from April 1991 until July 1995 in the form of alleged "street taxes." (R. 567, Motion for Entry of Forfeiture Judgment, C Apx Vol 2 pg 671-72)

After hearing oral argument, on October 23, 1998, the District Court issued a thirteen page ruling addressing and rejecting each of the government's forfeiture contentions for lack of supporting evidence. App. 40-53 In that Order, the District Court found that the government had failed to present evidence sufficient to meet its preponderance burden of proof on any of its forfeiture claims.

The government adduced no documentary evidence of any criminal proceeds, and instead rested principally upon the immunized trial testimony of two government witnesses, Angelo Polizzi and Silverio Vitello. Angelo Polizzi was not himself an alleged RICO co-conspirator, but rather was a convicted former attorney disbarred for recruiting his close friends into a government-initiated drug money laundering operation. Angelo Polizzi's contribution to the evidence took the form of hearsay accounts of what his deceased father had allegedly told him years before.

Angelo Polizzi's testimony as to any proceeds was both limited and was contradicted by testimony from his own mother, Angeline Polizzi.

Government witness Silverio Vitello testified at trial about giving alleged labor peace payments to one defendant (Mr. Giacalone) with whom he was a partner in an unrelated trucking business. These payments had no relationship to the sports gambling allegations of the Indictment. None of the defendants were charged with labor racketeering. The District Court declined to order forfeiture "based on this evidence," and observed that the government "offered no evidence to show that the money paid to [defendant] Giacalone was ever shared by others in the Detroit partnership."[2]

The government also contended that decades ago the defendants obtained and then sold hidden ownership interests in two Nevada gambling hotels, the Edgewater Hotel and the Frontier Hotel. The District Court rejected these forfeiture claims based upon the trial record.

As to the Edgewater Hotel, the indictment alleged that defendants "would and did use individuals, such as William Pompili, as fronts or straw men to represent their interests in the Edgewater Hotel and Casino . . . to conceal

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[2] This forfeiture finding was not made in the abstract, but rather reflected the District Court's awareness – made clear at the time this evidence was admitted at trial – of the marginal relevance of this evidence to the Indictment. T. Apx Vol 9 pg 3729-30 ("I am running out of my capacity to conceive how this is relevant and I, . . . just don't understand how whatever happened with somebody down in Toledo of Local 20 of the IBP has anything to do with what the jury's got to worry about here.").

their interests from the State of Nevada gambling authorities." At trial, however, the government never adduced any evidence that Mr. Pompili held any ownership interest in the Edgewater Hotel.

In moving for forfeiture of the alleged Edgewater hidden interests, the government departed from the Indictment by contending that the relevant straw men were five other individuals (Messrs. Munly, Glazer, Assemany, Kassab, and Stone). At trial, however, the government introduced evidence that these five individuals withdrew their applications prior to a licensing ruling, and that, in accordance with Nevada law, *their investments were returned to them*. Accordingly, the government's own evidence established that, if these were the alleged straw men, (1) they were unsuccessful in obtaining an interest in the Edgewater, and (2) they made no profit on their unsuccessful effort to acquire the Edgewater because their investment was returned to them prior to any acquisition.

The government also relied upon an August 1982 conversation overheard by FBI Special Agent Ruffino. Special Agent Ruffino testified that he overheard a conversation between defendant Vito Giacalone and William Pompili regarding plans for acquiring an interest in Little Caesars, another hotel.[3] Even assuming that the

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[3] Agent Ruffino's account is as follows:

Q: Sir, would you read Paragraph 2 of Page 1 of your August 18th 302?

A: Giacalone says, "The last thing we talked about, we'll go in the back door on this guy for the license." Giacalone discussing having $800,000 and $1.6 million dollars and having another $800,000 on December 31st. Giacalone also says something about going to the bank

(Continued on following page)

government gets the benefit of all possible inferences from this fragmentary account, however, the conversation related to a future plan to acquire an interest in a hotel. Indeed, the government directly asked Agent Ruffino at trial whether he "was able to determine whether or not the joint was bought, Mr. Giacalone indicate that?" to which Agent Ruffino replied: "I don't recall – I don't recall that specific conversation."

Finally, even if the government's speculation about defendant Giacalone buying a hidden interest in the Edgewater at some unknown time is sufficient, there was no evidence that this interest was ever sold, or, more importantly, that petitioners or any defendant participated in either the purchase or sale of such an interest. As the District Court found, the "government has failed to show, by a preponderance of the evidence, that the Detroit partnership received and distributed among themselves any amount of money or other valuable thing from the sale of the Edgewater Hotel." App. 49.

The District Court not only found that the government had failed to link any alleged hidden Nevada hotel interest to these defendants, it also found that the Indictment

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and getting a commitment for $540,000. He then mentions buying Little Caesar's, saying 'We'll put in four black jacks, a gift shop, an hundred and twenty slots. They're going to sell to us. Half will be his, the other half will be ours. We'll have this other joint to cover us.

Q: Special Agent, at the time that you heard this and wrote this down, did you have any idea of what they were, what Mr. Giacalone was talking about?

A: I had a rough idea, but not, not exactly. (Samuel Ruffino, Tr, T Apx Vol 7 pg 3038)

failed to give defendants adequate notice that the government intended to seek forfeiture based upon the sale of ownership positions in Nevada hotels. App. 49. The District Court further pointed "out that the gambling activity carried on by these hotels was not illegal." App. 49.

The government appealed these adverse factual findings to the Sixth Circuit Court of Appeals. Petitioners challenged the appeal on the ground, among others, that the Double Jeopardy Clause applies to criminal forfeitures and prohibits an appeal or continued prosecution of forfeiture allegations as to which the government had tried, but failed, to adduce sufficient evidence.

The Sixth Circuit held that Double Jeopardy does not bar government appeals from adverse criminal forfeiture findings. *United States v. Corrado*, 227 F.3d 543 (6th Cir. 2000). App. 1-29. According to the Sixth Circuit, because criminal forfeitures are considered part of a defendant's sentence, this Court's opinion in *Monge v. California*, 524 U.S. 721 (1998) compels the conclusion that the Double Jeopardy Clause is inapplicable to criminal forfeiture proceedings. *Corrado*, 227 F.3d at 549-50. App. 8.

After rejecting the applicability of the Double Jeopardy Clause, the Sixth Circuit re-examined the forfeiture factual findings of the District Court, upholding some findings while reversing others. In particular, the Sixth Circuit reversed a finding of the District Court that the government had failed to adduce sufficient evidence that petitioners obtained any proceeds from any sale of any interest in the Edgewater Hotel. 227 F.3d at 556. There was no record evidence adduced at trial by the government, however, of any purchase or sale of the Edgewater Hotel by anyone, much less evidence of the generation of

proceeds from such a transaction. Indeed, while reversing this factual finding of the District Court, the Sixth Circuit acknowledged that "there is sufficient uncertainty as to the profits or revenues derived from this transaction to necessitate a remand to the district court on the Edgewater forfeiture question." App. 24.

Thus, as a result of the Sixth Circuit's double jeopardy ruling, petitioner was not only subjected to a government appeal of forfeiture contentions lacking sufficient evidentiary support in the record, but also now faces a renewed prosecution upon remand of forfeiture allegations as to which the government's evidence was found deficient by both the District Court and the Sixth Circuit Court of Appeals. The result of the Sixth Circuit's denial of any double jeopardy protection for criminal forfeitures is endless evidentiary opportunities for the government to seek imposition of criminal forfeitures.

REASONS FOR GRANTING THE PETITION

The Sixth Circuit's opinion conflicts with decisions of this Court and of the Fourth Circuit Court of Appeals. In particular, the panel decision conflicts with *United States v. Ursery*, 518 U.S. 267 (1996), *One Lot Emerald Cut Stones v. United States*, 409 U.S. 235 (1972), and *Burks v. United States*, 437 U.S. 1 (1978). The petition for certiorari therefore presents a fundamental constitutional question – whether the Double Jeopardy Clause prevents the government from relitigating criminal forfeiture allegations which it failed to prove to a trier of fact.

The Sixth Circuit's ruling in this case that double jeopardy protections do not apply to criminal forfeitures

runs counter to well established precedent from this Court classifying criminal forfeitures as "punishment" for purposes of triggering constitutional protections, including the protections of the Double Jeopardy Clause. *See, e.g.*, *United States v. Ursery*, 518 U.S. 267 (1996); *One Lot Emerald Cut Stones v. United States*, 409 U.S. 235 (1972). In the *Ursery* case, for example, this Court held that the Double Jeopardy Clause did not preclude a criminal prosecution because of a prior civil forfeiture, but it did so based upon the Court's conclusion that the civil forfeiture at issue was not sufficiently punitive to be considered a criminal punishment. *See, e.g.*, *Ursery*, 518 U.S. at 295-96 (Kennedy, J., concurring) (describing Court's opinion as determining "whether first, Congress intended the proceedings to be civil, and second, the forfeitures are so punitive as to be criminal in nature and therefore subject to the Double Jeopardy Clause.").

Here, there should be no question but that the criminal forfeitures sought by the government against petitioners are punitive enough to be deemed "criminal in nature and therefore subject to the Double Jeopardy Clause." *Ursery*, 518 U.S. at 295-96 (Kennedy, J., concurring). Under this Court's precedent, a sanction is punitive for Double Jeopardy Clause purposes if Congress intended that it be punishment for a crime. *Hudson v. United States*, 522 U.S. 93, 99 (1997) (citing *United States v. Ward*, 448 U.S. 242, 248 (1980)).

Criminal forfeitures are *in personam* punishment for a crime. *United States v. Bajakjian*, 524 U.S. 321, 332 n.7 (1998). *See also*, Reed & Gill, *RICO Forfeitures, Forfeitable Interests, and Procedural Due Process*, 62 N.C.L. Rev. 57, 57-67 (1983) (describing historical origins of criminal forfeiture under RICO). Congress barred federal criminal

forfeitures until the enactment of the RICO statute in 1970. *Bajakjian*, 524 U.S. at 332 n.7.

Beginning with the landmark opinion in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963), this Court has developed an evolving set of standards for determining what constitutional protections apply to the imposition of specific sanctions by the government. In a series of cases, starting with *United States v. Ward*, 448 U.S. 242 (1980), traveling through *United States v. Halper*, 490 U.S. 435 (1989), and culminating in *Hudson v. United States*, 522 U.S. 93 (1997), this Court has grappled with the applicability of the Double Jeopardy Clause to the imposition of various government sanctions. While this line of precedent has not been unwavering, a clear test has emerged, and was summarized by Justice Kennedy in his concurring opinion in *Ursery*: "whether, first, Congress intended the proceedings to be civil, and second, the forfeitures are so punitive as to be criminal in nature and therefore subject to the Double Jeopardy Clause." *Ursery*, 518 U.S. at 295-96 (Kennedy, J., concurring).

Criminal forfeitures under RICO are criminal in name and punitive in effect. The criminal label attached to *in personam* forfeitures is compelling evidence of Congressional intent that they are criminal sanctions, and this Court has already held that Congress intended that criminal forfeitures be punitive. *United States v. Bajakjian*, 524 U.S. at 332 n.7.

The Double Jeopardy Clause protects individuals from successive criminal prosecutions as well as from the imposition of multiple punishments. *Witte v. United States*, 515 U.S. 389, 396 (1995). As this Court held, the " 'Constitution was designed as much to prevent the criminal from

being twice punished for the same offense as from being twice tried for it.'" *Witte*, 515 U.S. at 396 (quoting *Ex parte Lange*, 18 Wall. 163, 173 (1874)).

To safeguard these constitutional rights, this Court has held that the Double Jeopardy Clause prohibits the government from seeking to relitigate its claims, at either the trial or appellate level, once a trier of fact has determined that the government has failed to adduce sufficient evidence to prove its case. *Burks v. United States*, 437 U.S. 1 (1978). In the words of the *Burks* opinion, the government is entitled to only "one fair opportunity to offer whatever proof it could assemble." *Burks*, 437 U.S. at 16.

The Sixth Circuit reached a contrary conclusion by holding that criminal forfeitures are "sentences" for constitutional purposes, and as such are immune from the protections of the Double Jeopardy Clause. *Corrado*, 227 F.3d at 549-50. More specifically, the Sixth Circuit held that this Court classified criminal forfeitures as sentences in *Libretti v. United States*, 516 U.S. 29 (1995), and that this Court thereafter held in *Monge v. California*, 524 U.S. 721 (1998) that double jeopardy protections have no application to noncapital sentencing. *Corrado*, 227 F.3d at 549-50.

In the *Libretti* case, this Court addressed only whether Rule 11 of the Federal Rules of Criminal Procedures requires a judicial inquiry at the time of sentencing into the factual basis for a plea bargain's forfeiture terms.[4]

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[4] The *Libretti* opinion did state that a criminal forfeiture "is an element of the sentence imposed following conviction." 516 U.S. at 361. This observation, however, was made to distinguish between the

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In answering this in the negative, this Court was careful to note that it was construing Rule 11(f) only, and not the other rules which attach heightened procedural fact-finding safeguards for criminal forfeitures. *Libretti*, 516 U.S. at 364. The *Libretti* opinion thus did not address the applicability of the Double Jeopardy Clause to criminal forfeitures.

This Court's opinion in the *Monge* case appears to have held that, at least as to sentencing enhancements based upon recidivism, double jeopardy does not apply. 524 U.S. at 734 ("We conclude that . . . the Double Jeopardy Clause does not preclude retrial on a prior conviction allegation in the noncapital sentencing context."). There is language in *Monge*, however, suggesting that double jeopardy is inapplicable to any sentencing other than capital sentencing. 524 U.S. at 730.

In 2000, however, this Court revisited the *Monge* opinion in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and held that a number of constitutional rights, including the right to a jury trial, attach to the fact-finding used for purposes of enhancing certain noncapital sentences. The *Apprendi* opinion narrowly characterized *Monge* as "another recidivism case." 530 U.S. at 488 n.14.

One court has recently concluded that the "reach of *Monge* was significantly curtailed by a sharply divided Court in *Apprendi* two years later." *Ex parte Watkins*, 73

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accepted character of forfeiture as "punishment," versus the claim being made by petitioner in *Libretti* – that forfeiture is an element of the offense that is a precondition to entry of conviction (and therefore subject to the factual foundation requirements of Rule 11(f)).

S.W.3d 264 (Tex. Crim. App. 2002). In the *Watkins* case, the Texas Court of Criminal Appeals described the *Apprendi* opinion's narrowing of *Monge* as follows:

> The [*Apprendi*] Court distanced itself from *Monge*, noting that the double jeopardy principles as applied to prior enhancements are perhaps sui generis and that prior Supreme Court cases addressing recidivism statutes did not challenge the accuracy of the specific facts decided in those cases. . . .
>
> In sum, . . . the decision in that case appears to be confined to double jeopardy dealing with prior convictions, not other punishment facts.

73 S.W.3d at 267.

The adverse criminal forfeiture findings of the District Court in this case do not involve prior convictions nor recidivism sentencing enhancements. Instead, they involve fundamental factual findings going to defendant's alleged criminal acquisition of forfeitable criminal proceeds.

The Fourth Circuit Court of Appeals has held that the Double Jeopardy Clause attaches to criminal forfeiture proceedings. *See, e.g., United States v. Ham*, 58 F.3d 78 (4th Cir. 1995). Quoting from *Burks v. United States*, 437 U.S. 1, 16 (1978), the Fourth Circuit held that the "government is entitled to only one fair opportunity to offer whatever proof it [can] assemble." *Ham*, 58 F.3d at 82 (quoting *Burks*, 437 U.S. at 16).

Thus, a split exists in the circuits on this fundamental constitutional issue, and this is an appropriate basis for seeking a writ of certiorari from the Supreme Court. *See*, Sup. Ct. R. 10(a). Moreover, resolving whether the government may appeal or thereafter relitigate forfeiture

claims as to which it has previously failed to adduce sufficient evidence is an issue of institutional importance to federal courts, as the ability of the government to obtain a second, or even a third bite at the apple is predicated upon the constitutional assumption that Double Jeopardy imposes no obstacle to such repeated efforts to punish a defendant.

Finally, the prospect of affording the government an unlimited number of opportunities to forfeit property under the criminal forfeiture laws will undermine the finality interests not only of the federal courts and litigants, but also the interests of affected property interests. Third parties with joint or distinct legal interests in property that are swept up into criminal forfeiture proceedings will be deprived of certainty as to whether, or when, the government's claims adverse to their property interests will be finally adjudicated.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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227 F.3d 543

United States Court of Appeals,
Sixth Circuit.

UNITED STATES of America, Plaintiff-Appellant,

v.

Paul CORRADO; Jack W. Tocco; Vito W. Giacalone; Nove Tocco; Anthony J. Corrado, Defendants-Appellees.

No. 98-2315.

Argued: June 16, 2000
Decided and Filed: Sept. 27, 2000

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Carole M. Stanyar (briefed), Detroit, Michigan, for Defendant-Appellee Anthony Corrado.

Before: WELLFORD, NELSON, and GILMAN, Circuit Judges.

WELLFORD, Circuit Judge.

The five named defendants in this case were convicted of conspiracy under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(d), as alleged members of the Detroit Mafia. Based on those convictions, the government sought a forfeiture against the defendants pursuant to 18 U.S.C. § 1963(a)(3), and the parties agreed to have the district judge decide the forfeiture amount. On October 23, 1998, the district court issued an order finding that the government was not entitled to any forfeiture, because, among other things, the evidence was insufficient to trace the allegedly illegal proceeds to each particular defendant. The government has filed this timely appeal. We now reverse as to defendants Jack Tocco and Vito William Giacalone, and we will withhold our opinion as to defendants Paul Corrado, Nove Tocco, and Anthony Corrado pending the outcome of our remand of their related appeals. *See United States v. Corrado,* 227 F.3d 528 (6th Cir.2000), *and United States v. Corrado,* Nos. 98-2394, 99-1001, 2000 WL 1290343 (6th Cir.2000).

I. BACKGROUND

The five defendants were charged, along with twelve other defendants, in a twenty-five-count indictment relating to their alleged involvement in the Detroit branch of the national Mafia organization known as the "Cosa Nostra." Jack Tocco and Anthony Corrado were convicted on two counts of conspiracy under RICO, one based on a pattern-of-racketeering-activity (count 1) and one based upon the collection-of-unlawful-debts (count 2), and on one count of a Hobbs Act conspiracy, 18 U.S.C. § 1962(d) (count

6). Paul Corrado and Nove Tocco were convicted of the RICO pattern of racketeering activity conspiracy (count 1) and the Hobbs Act conspiracy (count 6). Vito Giacalone pled guilty to the RICO collection of unlawful debts conspiracy (count 2), and his plea agreement stated specifically that "nothing in this agreement will limit the defendant's liability [as to criminal forfeiture]."

On the basis of those convictions, the government sought a forfeiture for proceeds derived from the defendants' respective crimes. Specifically, the government alleged that all five defendants were jointly and severally liable for $234,700 that was collected in "street tax" extortions.[1] The government further claimed that Jack Tocco, Anthony Corrado, and Vito Giacalone, in addition to the $234,700 amount, were jointly and severally liable for $4.2 million in profits that the conspiratorial enterprise allegedly received from the sale of two hotels in Las Vegas (the Frontier Hotel and the Edgewater Hotel), $1 million that the conspiracy extorted from Sal Vitello, and $38,400 it received in proceeds from the collection of unlawful gambling debts. Thus, the government sought a total forfeiture amount of $5,473,100.

The district court concluded that the evidence presented by the government at trial did not provide, by a "preponderance of the evidence," a sufficiently quantified factual basis for assessing any forfeiture against the defendants. The court stated that "[t]he proceeds of the

[1] The "street tax" referred to herein is a type of "franchise fee" allegedly extorted from bookmakers who ran illegal gambling businesses that were not affiliated with the Detroit group.

illegal activity upon which the jury based its guilty verdicts were insufficiently sourced to the illegal activities upon which the RICO convictions were based and insufficiently tracked into the hands of the co-conspirators or the individual defendants involved here for the court to make any forfeiture award." Consequently, the court denied the government's request for a forfeiture judgment. The government filed this timely appeal.

II. JURISDICTION

On May 28, 1999, Jack Tocco moved to dismiss this appeal based on an alleged lack of appellate jurisdiction and on double jeopardy grounds. He claimed that 18 U.S.C. § 3742(b) does not provide a basis on which the government can appeal the district court's decision, and that, even if a statutory basis existed for the appeal, a reversal of the district court's $0 **forfeiture** award would violate the **Double Jeopardy** Clause. The other defendants joined in Jack Tocco's motion.

On August 10, 1999, a three-judge panel of this court rejected the defendants' motion to dismiss, and the basis of that decision was set out succinctly:

> A criminal forfeiture is an element of sentencing and not an element of a criminal offense. *See Libretti v. United States,* 516 U.S. 29, 116 S.Ct. 356, 133 L.Ed.2d 271 (1995). Thus, an appeal by the government may be authorized by 18 U.S.C. § 3742(b). *See United States v. Infelise,* 159 F.3d 300 (7th Cir.1998); *United States v. Investment Enterprises, Inc.,* 10 F.3d 263 (5th Cir.1994). Moreover, as a general rule, except in death penalty cases, Double Jeopardy does not apply to sentencing. *Monge v. California,* 524 U.S. 721,

> 118 S.Ct. 2246, 141 L.Ed.2d 615 (1998). Therefore, we decline to dismiss the government's appeal at this time. However, because the issues raised in the motions to dismiss are intertwined with the merits of the appeal, the parties are directed to address these issues in their appellate briefs.

Thus, the panel denied the motion "without prejudice to subsequent reconsideration by the panel to be assigned to hear this appeal on the merits." We now reconsider the defendants' allegations.

A. Basis for Appellate Jurisdiction

Title 18 U.S.C. § 3742(b) is the principal statute that provides circumstances under which the government may appeal a district court's sentencing determination. That section provides in pertinent part:

> (b) Appeal by the Government. – The Government may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence –
>
> (1) was imposed in violation of law:
>
> (2) was imposed as a result of an incorrect application of the sentencing guidelines . . . ;
>
> (3) was imposed for an offense for which a sentencing guideline has been issued . . . , and the sentence is less than [the sentence specified or the sentence stated in any plea agreement]; or
>
> (4) was imposed for an offense for which no sentencing guideline has been issued . . . and is less than the sentence specified in a plea agreement, if any . . . ;

> and the Attorney General or the Solicitor General personally approves the filing of the notice of appeal.

18 U.S.C. § 3742(b); *see* 15B CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3919.8 (Supp.2000).

In this case, the government filed a certificate of compliance, which acknowledges the approval of the Solicitor General for the filing of the notice of appeal in this case. The opening statement of the government's appeal sets forth the basis of its challenge:

> The Government appeals from the forfeiture judgments of $0 which the district court entered against five defendants convicted of RICO conspiracy in a case which targeted the Detroit Cosa Nostra. The Government appeals the amount of forfeiture entered as to all five defendants with regard to the amount of forfeiture assessed for the proceeds of the street tax extortion predicate act of count one. In addition, as to defendants Jack Tocco, Anthony Corrado, and Vito Giacalone only, the Government appeals the district court's failure to assess any amount of forfeiture as to the other predicate acts of count one and as to the RICO collection of unlawful debt conspiracy in count two.

The defendants argue that the government's appeal does not fall into any of the provisions of § 3742(b) and, therefore, this court lacks jurisdiction to hear the appeal. We disagree.

It is well-established "[t]hat the government has no right of appeal in a criminal case unless a statute expressly grants such a right." *United States v. Investment*

Enterprises, Inc., 10 F.3d 263, 270 (5th Cir.1993). A criminal forfeiture award is a part of the defendant's sentence, not part of the substantive offense of conviction. *Libretti v. United States*, 516 U.S. 29, 39, 116 S.Ct. 356, 133 L.Ed.2d 271 (1995). Thus, where the government alleges that the $0 award of forfeiture was imposed in violation of the law, the government has the statutory authorization to appeal. *See United States v. Infelise*, 159 F.3d 300 (7th Cir.1998) (holding that an order of forfeiture is part of the defendant's sentence and is appealable by the government); *Investment Enterprises*, 10 F.3d at 270-71 (finding that forfeiture is part of the defendant's sentence and is appealable by the government where the sentence was allegedly imposed in violation of the law).

B. Double Jeopardy

The defendants argue that, even if statutory authority exists for this appeal, allowing the government to challenge the district court's $0 award of **forfeiture** violates the **Double Jeopardy** Clause.[2] They argue that the district court, sitting as the agreed trier of fact, reviewed the evidence and made the determination that no forfeiture award was warranted. Thus, the defendants argue, they are entitled to that "acquittal," and the government's appeal would unconstitutionally subject them to being put in **double jeopardy** of criminal **forfeiture**.

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[2] The Double Jeopardy Clause of the Fifth Amendment provides, "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb."

The prior panel that decided this issue rejected the defendants' claim based on *Libretti v. United States,* 516 U.S. 29, 116 S.Ct. 356, 133 L.Ed.2d 271 (1995), and *Monge v. California,* 524 U.S. 721, 118 S.Ct. 2246, 141 L.Ed.2d 615 (1998). In *Libretti,* the Supreme Court held that criminal forfeiture was an aspect of sentencing following the conviction of a substantive criminal offense. *Libretti,* 516 U.S. at 39, 116 S.Ct. 356. The Court stated specifically that "Congress plainly intended forfeiture of assets to operate as punishment for criminal conduct in violation of the federal drug and racketeering laws, not as a separate substantive offense." *Id.* In support of its decision, the Court observed:

> Our precedents have likewise characterized criminal forfeiture as an aspect of punishment imposed following conviction of a substantive criminal offense. In *Alexander v. United States,* 509 U.S. 544, 113 S.Ct. 2766, 125 L.Ed.2d 441 (1993), we observed that the criminal forfeiture authorized by the RICO forfeiture statute "is clearly a form of monetary punishment no different, for Eighth Amendment purposes, from a traditional 'fine.'" *Id.,* at 558 [, 113 S.Ct. 2766]. Similarly, in *United States v. $8,850,* 461 U.S. 555, 103 S.Ct. 2005, 76 L.Ed.2d 143 (1983), we recognized that a "criminal proceeding . . . may often include forfeiture as part of the sentence." *Id.* at 567[, 103 S.Ct. 2005].
>
> *Id.*

In *Monge,* the Court held that, except in death penalty cases, the Double Jeopardy Clause does not apply to sentencing:

> The Double Jeopardy Clause "does not provide the defendant with the right to know at any specific moment in time what the exact limit of his punishment will turn out to be." *DiFrancesco,* 449 U.S. at 137[, 101 S.Ct. 426]. Consequently, it is a "well-established part of our constitutional jurisprudence" that the guarantee against double jeopardy neither prevents the prosecution from seeking review of a sentence nor restricts the length of a sentence imposed upon retrial after a defendant's successful appeal. See *id.* at 135[, 101 S.Ct. 426] . . . .

Monge, 524 U.S. at 730, 118 S.Ct. 2246; *see also United States v. DiFrancesco,* 449 U.S. 117, 141, 101 S.Ct. 426, 66 L.Ed.2d 328 (1980).

Subsequently, with four of the justices participating in the *Monge* majority decision dissenting, the Supreme Court decided *Apprendi v. New Jersey,* ___ U.S. ___, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). In that case, the defendant was convicted pursuant to a guilty plea for unlawful firearm possession. He was subsequently sentenced to an extended term under New Jersey's hate crime statute because the court made the finding of fact, by a preponderance of the evidence, that the defendant had committed the crime with a biased purpose. The Supreme Court reversed, holding that, when a defendant's sentence is increased beyond the statutory maximum based on any fact other than the fact of a prior conviction, that fact must be submitted to a jury and proved beyond a reasonable doubt, rather by a preponderance of the evidence. *See id.* at ___, 120 S.Ct. 2348. Justice Stevens, writing for the majority, made the following conclusion:

> Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the

> prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. With that exception, we endorse the statement of the rule set forth in the concurring opinions in that case: "[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt." 526 U.S. at 252-53, 119 S.Ct. 1215 (opinion of STEVENS, J.); *see also id.* at 253, 119 S.Ct. 1215, (opinion of SCALIA, J.).

Id. (footnote omitted) (relying on *Jones v. United States,* 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999)).

Jack Tocco argues to this court that *Apprendi* supports his position that he has a "legal right to a factual determination by a trier of fact in the District Court," presumably proven beyond a reasonable doubt. We hold, however, that *Apprendi* is not applicable under the circumstances of this controversy. The jury determined that the defendants were guilty of the RICO charges beyond a reasonable doubt. The convictions were based on proof of specific charges and the defendants were put on notice under the indictment that criminal forfeitures under 18 U.S.C. § 1963 would be pursued once these underlying criminal convictions were obtained. This is an entirely different circumstance from the situation in *Apprendi.*

As recognized in *Libretti,* criminal forfeiture has been deemed to be a part of the sentence in criminal proceedings of the type involved in this case. *Libretti,* 516 U.S. at 39, 116 S.Ct. 356; *see also United States v. $8,850,* 461 U.S. 555, 567, 103 S.Ct. 2005, 76 L.Ed.2d 143 (1983)

(recognizing that forfeiture is a part of the sentence). "The simple fact [is] that forfeiture is precisely that punishment." *Libretti,* 516 U.S. at 41, 116 S.Ct. 356. There is no requirement under *Apprendi,* or in any other precedent cited by the defendants, that the jury pass upon the extent of a forfeiture, particularly when the parties, represented by counsel, have stipulated that the district court will decide that issue. Moreover, "[s]entencing decisions favorable to the defendant . . . cannot generally be analogized to an acquittal" as the defendants contend in this case. *Monge,* 524 U.S. at 729, 118 S.Ct. 2246. Accordingly, we reject the defendants' argument that the jury must decide the extent of forfeiture or that the district court, as the agreed trier of fact, must make fact determinations based on the "beyond a reasonable doubt" standard. *See United States v. DeFries,* 129 F.3d 1293, (D.C.Cir.1997) (recognizing that, under *Libretti,* "[t]he government must prove its forfeiture allegations by a preponderance of the evidence").

In sum, we hold that the criminal forfeitures sought in this case constitute a part of the defendants' sentences, and are appealable under § 3742(b). In addition, we find that, in accordance with the Supreme Court's decision in *Monge,* the **Double Jeopardy** Clause does not apply to sentencing and, therefore, does not prohibit the government from appealing the district court's **forfeiture** award.

III. MERITS OF THE APPEAL

As has been indicated above, the government sought a total forfeiture amount of $5,473,100 pursuant to 18 U.S.C. § 1963(a)(3), which provides for the forfeiture of "any property constituting, or derived from, any proceeds

which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962." Though the government sought to hold all of the defendants jointly and severally liable for the $234,700 collected as street taxes, the government claimed that Jack Tocco, Anthony Corrado, and Vito Giacalone were also jointly and severally liable for the remainder through the sale of the hotels ($4.2 million), the extortion from Sal Vitello ($1 million), and the collection of unlawful gambling debts ($38,400).

The district court concluded, however, that the evidence did not provide a sufficiently quantified factual basis for any of the claimed forfeiture amounts. The court surmised:

> While the jury found each of the defendants (except Vito William Giacalone, who pleaded guilty) guilty . . . it did so based on evidence so disparate in time and nature to have, in the court's opinion, rendered it impossible to make a rationally quantified finding of fact that the partners and associates in the Detroit partnership obtained anything sufficiently determinable in degree of value to allow the calculation of an amount for forfeiture.

The court then stated that it would "consider appropriate fines" at sentencing, but fines ultimately were imposed on only Anthony Corrado and Jack Tocco for $140,131 and **$94,447**, respectively, substantially less than any claimed forfeiture amount.

On appeal, the government contends that the district court's decision was erroneous because (1) the RICO forfeiture statute is mandatory and requires a court to order

a forfeiture of sufficiently quantifiable assets; (2) all co-conspirators should be jointly and severally liable for the proceeds generated by the co-conspirators; and (3) the evidence was sufficient to hold all five defendants liable for the proceeds generated by the conspiracy. We review the district court's legal conclusions *de novo,* and will review the court's findings of fact for clear error. *See United States v. Charles,* 138 F.3d 257, 267 (6th Cir.1998); *United States v. Williams,* 962 F.2d 1218 (6th Cir.1992). "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made." *United States v. United States Gypsum Co.,* 333 U.S. 364, 395, 68 S.Ct. 525, 92 L.Ed. 746 (1948). We are mindful that § 1963(a)(3) is to be broadly interpreted to effectuate its remedial purpose. *See Russello v. United* States, 464 U.S. 16, 26-27, 104 S.Ct. 296, 78 L.Ed.2d 17 (1983); *DeFries,* 129 F.3d at 1315. Furthermore, as we have stated, the government must prove its right to forfeiture by a preponderance of the evidence.

A. Paul Corrado, Nove Tocco, and Anthony Corrado

These three defendants appealed their convictions and sentences in separate proceedings before this court. *See (Paul) Corrado, supra,* and *(Anthony) Corrado, supra.* One of the allegations raised by all three defendants was that the district court inadequately questioned jurors regarding alleged jury tampering. We held in *(Paul) Corrado* that "[t]he nature and scope of the investigation required when jury misconduct is credibly alleged was set forth by the Supreme Court in *Remmer v. United States,* 347 U.S. 227, 74 S.Ct. 450, 98 L.Ed. 654 (1954)." *(Paul) Corrado,* 227 F.3d at 536. Because the district court did not conduct an

adequate evidentiary hearing into the allegations of jury tampering, we remanded to the district court to investigate according to the standard set out in *Remmer. Id.* at 536. We remanded in the *(Anthony) Corrado* case under the same strictures, although Anthony Corrado failed to present specific objections during trial. *See (Anthony) Corrado,* at *5. Because the outcome of those remand proceedings could possibly result in a new trial and render these forfeiture issues moot, we will withhold our opinion as to Paul Corrado, Nove Tocco, and Anthony Corrado pending the outcome of the district court's proceedings. Consequently, as of the date of this opinion, the following analysis will be effective as to only defendants Jack Tocco and Vito Giacalone.

B. Mandatory nature of statute

RICO provides specifically that a defendant convicted of a violation of the Act "*shall* forfeit to the United States . . . any interest the person has acquired or maintained in violation of section 1962[and] any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962." 18 U.S.C. § 1963(a)(1) & (3) (emphasis added). In light of the "shall forfeit" language, courts have held that the statute creates a mandatory obligation of forfeiture after a RICO conviction. *See United States v. Faulkner,* 17 F.3d 745, 774-75 (5th Cir.1994) (holding that forfeiture is not discretionary; rather, jury instructions must follow the "shall forfeit" language of the statute); *United States v. Busher,* 817 F.2d 1409, 1413-14 (9th Cir.1987) (determining that forfeiture is not limited to tainted assets of a RICO enterprise, but extend to the convicted person's entire interest in the

enterprise). Though the statute appears to require total forfeiture of illegal proceeds, courts can reduce the forfeiture to make it proportional to the seriousness of the offense so as not to violate the Eighth Amendment prohibition against "cruel and unusual punishment" or "excessive fines." *See United States v. Sarbello,* 985 F.2d 716, 717-18 (3d Cir.1993) (holding that the mandatory statutory penalty may be reduced to conform to the Eighth Amendment).

We find that the "shall forfeit" language of the statute mandates that a district court assess forfeiture against the defendant when the facts support a finding of a sufficient nexus between the property to be forfeited and the RICO violation. *See DeFries,* 129 F.3d at 1313. "Only property 'acquired or maintained' through racketeering activity or 'derived from[ ] any proceeds ... obtained, directly or indirectly from racketeering activity' is subject to forfeiture." *Id.* We believe that this finding is consistent with the plain language of the statute and with the punitive purpose of RICO. *See Russello,* 464 U.S. at 26-27, 104 S.Ct. 296 (stating that RICO should be broadly construed to effectuate its remedial purpose); *DeFries,* 129 F.3d at 1315 (emphasizing that RICO forfeiture is a punitive, not a restitutive, remedy).

C. Joint and several liability

Though it recognized that joint and several liability would ordinarily apply to the forfeiture of proceeds arising out of a RICO conspiracy, the district court did not hold the defendants jointly and severally liable because "the evidence does not support with sufficient quantification of value either the amounts of property at derivation or the

movement of a quantified amount of property to a destination (or destinations)."[3] The district court, in fact, after discussing its interpretation of the meaning of the word "obtained" in § 1963(a)(3), referred to a "minimum required for an appropriate *joint and several* forfeiture judgment." (Emphasis added).

This court has noted the "numerous RICO criminal forfeiture cases which indicate that the nature of the RICO offense mandates joint and several liability." *Fleischhauer v. Feltner,* 879 F.2d 1290, 1301 (6th Cir.1989). We agree with a decision of a sister circuit that co-conspirators in a RICO enterprise should be held jointly and severally liable for any proceeds of the conspiracy:

> Codefendants are properly held jointly and severally liable for the proceeds of a RICO enterprise. . . . The government is not required to prove the specific portion of proceeds for which each defendant is responsible. Such a requirement would allow defendants "to mask the allocation of the proceeds to avoid forfeiting them altogether."

United States v. Simmons, 154 F.3d 765, 769-70 (8th Cir.1998); *see also United States v. Caporale,* 806 F.2d 1487, 1507 (11th Cir.1986) (stating that "joint and several liability is not only consistent with the statutory scheme [of RICO], but in some cases will be necessary to achieve the aims of the legislation"). Accordingly, we will apply the

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[3] Jack Tocco's counsel conceded in oral argument that the district court determined that joint and several liability might apply in this case if the evidence had supported the forfeiture.

principles of joint and several liability to any forfeiture that we deem to be warranted.

D. Sufficiency of evidence as to conspiratorial participation

The district court found that the evidence was insufficient to show that the defendants had actually "*obtained* anything sufficiently determinable in degree of value to allow the calculation of an amount of forfeiture." (Emphasis added). The court addressed the factual bases upon which the government sought forfeiture according to each category of illegal proceeds sought. We will follow that format and will discuss the involvement of each defendant as it relates to the particular category of proceeds.

i. Overview

A brief review of the conspiratorial enterprise is helpful in putting the other facts into context. Jack Tocco was alleged to be the "Boss" of this illegal enterprise, the head of members and capos (supervisors). Many members were charged in this case with participation in criminal activities "for financial gain," and the Boss and capos shared in the division of revenues, as allegedly did members, such as defendants Nove Tocco and Paul Corrado. Count one named the defendants as having engaged in a racketeering conspiracy involving extortionate credit or loan activities and collections, obstruction of justice, witness tampering, extortion, illegal gambling, and various conspiracies involving these acts and violent offenses, and acquiring concealed interests in Las Vegas gambling facilities. That count also charged that *each defendant* agreed that certain predicate acts of racketeering would be

committed in carrying out the illegal enterprise and conducting its affairs. Each of these defendants, except for Giacalone who pled guilty, were found to be guilty of count one.

Unlike the general conspiracy statute, § 1962(d) requires no "overt act or specific act" in carrying it forward. *Salinas v. United States,* 522 U.S. 52, 63, 118 S.Ct. 469, 139 L.Ed.2d 352 (1997). Furthermore, "the supporters are as guilty as the perpetrators . . . so long as they share a common purpose, conspirators are liable for the acts of their co-conspirators." *Id.* at 64, 118 S.Ct. 469. A RICO conspirator "may be convicted 'so long as he' agrees with such other person or persons that they *or one or more of them* will engage in conduct that constitutes such crime." *Id.* at 65, 118 S.Ct. 469 (quoting the Model Penal Code § 5.03(1)(a) (1962) (emphasis added)). *Salinas,* moreover, summarizes these conspiracy principles applicable to the RICO charges in counts one and two: "A conspiracy may exist even if a conspirator does *not agree* to commit or facilitate *every* part of the substantive offense. *See United States v. Socony-Vacuum Oil Co.,* 310 U.S. 150, 153-54, 60 S.Ct. 811, 84 L.Ed. 1129 (1940)." *Id.* at 63, 118 S.Ct. 469 (emphasis added). We agree that "it is not determinative that the defendant committed the crime to further his own agenda, if indeed he was only able to commit the crime by virtue of his position within the enterprise." *Id.; see also United States v. Indelicato,* 865 F.2d 1370, 1383 (2d Cir.1989) (en banc).

The government was charged with proving that the predicate acts in connection with the conspiracy were related to its illegal purposes, and that these acts constitute a threat of ongoing criminal activity. *H.J. Inc. v. Northwestern Bell Tel. Co.,* 492 U.S. 229, 239, 109 S.Ct.

2893, 106 L.Ed.2d 195 (1989); *Sedima, S.P.R.L. v. Imrex,* 473 U.S. 479, 496, 105 S.Ct. 3275, 87 L.Ed.2d 346 (1985). The standard, which was met in this case as to the pertinent RICO conspiracy counts, is known as the "relationship plus continuity test." *Imrex,* 473 U.S. at 496 n. 14, 105 S.Ct. 3292. "In defining a 'pattern' . . . Congress [provided that] '[c]riminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics.'" *Id.*

In considering the continuity prong of the requirements of proof, the Supreme Court has defined what is required:

> [T]he threat of continuity is sufficiently established where the predicates can be attributed to a defendant operating as part of a long term association that exists for criminal purposes. Such associations include, but extend well beyond, those traditionally grouped under the phrase "organized crime."

H.J. Inc., 492 U.S. at 242-43, 109 S.Ct. 2893.

As to relationship or relatedness, "[t]he business of a criminal enterprise is crime [and its] crimes form a pattern defined by the purposes of the enterprise." *United States v. Masters,* 924 F.2d 1362, 1366 (7th Cir.1991); *see also United States v. Eufrasio,* 935 F.2d 553, 565-66 (3d Cir.1991). The predicate acts do not necessarily need to be directly interrelated; they must, however, be connected to the affairs and operations of the criminal enterprise. *United States v. Locascio,* 6 F.3d 924, 943 (2d Cir.1993); *United States v. Qaoud,* 777 F.2d 1105, 1116 (6th Cir.1985).

We adopt the holding in a somewhat similar organized-crime case on the relatedness question:

> [T]he relatedness requirement can be satisfied by proof that: (1) the defendant was enabled to commit the offense solely by virtue of his position in the enterprise; or (2) the offense was related to the activities of the enterprise.
>
> *Locascio,* 6 F.3d at 943.

ii. Street taxes

The district court denied any forfeiture award against Nove Tocco, Paul Corrado, and the other defendants despite much evidence of recorded conversations between Nove and Paul regarding their forceful collections of the street tax from bookmakers engaged in illegal gambling. The $234,700 in street tax proceeds was calculated from the amounts taken from statements that the two were "generating about $100,000 a year off the street" from the business. Conservatively estimating that the activity continued for one and one-half years in the early 1990s, the government concluded that Nove and Paul generally collected about $150,000 over 18 months. In addition, more specific evidence showed that about $84,700 was extorted from Ramzi Yaldoo and George Yatooma, both of whom testified at trial as to the amounts extorted from them. Thus, the evidence was undisputed that Nove Tocco and Paul Corrado were engaged in this extortionate activity, receiving at least $234,700.

The district court determined that Paul and Nove were acting on behalf of the conspiratorial enterprise and that their collection of the street taxes should be attributable to the members of the enterprise. From our review of

the transcripts of the tape recordings, we find that it was clear error for the district court to fail to attribute those proceeds to Jack Tocco and Giacalone, who were members of the criminal enterprise. The government should not have been required to prove that Nove and Paul shared their collections with other partners. Nor was it required to show the proportion of sharing or to trace these extortionate collections back to each member. The entire illegal scheme could not have succeeded were it not for the support, or the use of the name and the reputation of, the conspiratorial enterprise. Witnesses testified that they believed that Nove and Paul were supported by the larger organization of which they were a part. Recorded conversations between Nove and Paul indicate that they were working with (or for), or were empowered by, the "capos" Jack Tocco and Anthony Corrado. Because the amount of proceeds from this activity was quantifiable from the evidence at trial, and because the evidence showed that the scheme was related to the entire criminal enterprise of which these defendants were active members, we find that the district court committed clear error in failing to hold Jack Tocco and Giacalone jointly and severally liable for forfeiture of the street tax proceeds.

iii. Sale of the hotels – Frontier

The government asserted that the profits made from the sale of the hotel interests were a basis for forfeiture against Jack Tocco and Vito Giacalone. With respect to the sale of the Frontier Hotel specifically, evidence was submitted solely through the testimony of Anthony Polizzi, who testified that the hotel was sold to Howard Hughes for a $1,000,000 profit. Polizzi testified that his father stated that he and his partners each received unspecified shares

of the proceeds from the sale. Michael Corrado and Anthony Zerilli were convicted and imprisoned for conspiracy to acquire and maintain hidden interests in the Frontier Hotel gambling and casino operation. Further, Polizzi testified that he heard Jack Tocco thanking his father for his efforts in obtaining the interest on behalf of the partnership.

While we believe this is a close issue, we cannot ignore that there is relatively little corroborative evidence on this account. The sale of a hotel is a complicated transaction, yet there was no evidence that any of the defendants were personally involved, nor is there any evidence to corroborate the alleged statements made by Michael and related to his son regarding the involvement of the enterprise. The evidence of the "thank you" comment of Jack Tocco is not sufficient to show that the entire group was involved in this substantial transaction. Based on this scant evidence of a connection between the enterprise and the sale of this hotel, we decline the invitation to reverse the district court with respect to this $1,000,000 forfeiture request.

iv. Sale of the hotels – Edgewater

The evidence regarding the sale of the Edgewater Hotel, however, is a different matter. FBI agent Ruffino testified that he overheard a conversation between Anthony Corrado, Vito Giacalone, and William Pompili, where they were discussing the sale of their interest in the Edgewater. Ruffino stated that he received from the sale of the hotel "$800,000 and $1.6 million and having another $800,000 on December 31st," totalling $3.2 million. The district court attributed none of the $3,200,000 value to Anthony Corrado, Giacalone or Jack Tocco because "the

involvement in the Edgewater Hotel was not connected to the Detroit partnership *except through the participation of members Anthony Corrado and Vito William Giacalone.*" (Emphasis added). Again, because the government did not show that "the Detroit partnership received and distributed among themselves any amount of money . . . from the sale," forfeiture was denied, even as to Giacalone and Anthony Corrado.

In addition to the testimony of agent Ruffino, corroborating evidence from the Nevada Gaming Commission was submitted regarding the Edgewater interest. Also, there was evidence that Giacalone had meetings with Pompili, since deceased, in Las Vegas, and that Jack Tocco and Anthony Corrado also met with Pompili, who had architectural plans for the Edgewater Hotel and Casino.

Based on this evidence, which is considerably more substantial than the evidence relating to the sale of the Frontier, we find that it was clear error for the district court to deny forfeiture against Jack Tocco and Giacalone, jointly and severally, for the profits that the members of the enterprise shared from the sale of the Edgewater Hotel. The continuing activities were related to the illegal purposes of the conspiracy charged, and Giacalone's and Corrado's personal involvement confirms that the Cosa Nostra was involved in obtaining these illegal proceeds. The district court itself acknowledged the "participation" of defendants Anthony Corrado and Vito Giacalone and their "involvement" in the Edgewater Hotel transaction. As previously pointed out, the district court's requirement that "the Detroit partnership" must have "received and distributed among themselves" proceeds or monetary benefits from the Edgewater in order for forfeiture to attach was erroneous if any of the lead partners obtained

financial benefits by reason of their "participation or involvement" in that enterprise.

We find irrelevant the district court's observation that "the gambling activity carried on by these hotels was not illegal." The illegality of the transactions was the Detroit enterprise's concealment and misrepresentation involved in acquiring the secret interest held by the Detroit Cosa Nostra through straw men such as Pompili. This latter activity was sufficiently related to the charged conspiracy's pattern and practice of illegal activity with respect to gambling to put defendants on notice concerning potential forfeiture from the sale of the Edgewater Hotel. Item No. 13 of the indictment as to count one charged it "to be a part of the conspiracy" to use "fronts or straw men" to acquire interests in Nevada hotel casinos and "to conceal their interests from the State of Nevada." Thus, we find that there was sufficient proof to establish that the Edgewater Hotel transaction was a part of the conspiracy herein, particularly as to Vito Giacalone (and as to Anthony Corrado if he is not granted a new trial upon remand). However, there is sufficient uncertainty as to the profits or revenues derived from that transaction to necessitate a remand to the district court on the Edgewater forfeiture question. Thus, upon remand, the district court should consider, under the standards herein established as to forfeiture, to what extent or degree forfeiture should be ordered against Jack Tocco and Vito Giacalone.

v. Extortion from Sal Vitello

Silverio (Sal) Vitello testified that he paid Vito Giacalone $1,000 per week for about 10 years to assure labor peace. He also stated that he gave Giacalone random cash

payments and Christmas bonuses. He concluded that he paid about $1,000,000 to Giacalone in total. The government sought to use this testimony as a basis for an additional amount of forfeiture. The district court rejected that position, stating that "[t]he government offered no evidence to show that the money paid to Giacalone was ever shared by others in the Detroit partnership."

In our view, the evidence was sufficient to show that Giacalone obtained $1,000,000 from Sal Vitello for his assistance in using his influence and strong-arm support in challenging the unions. We find Giacalone was obviously empowered to help Vitello based on his membership in the Detroit "family." Although the district court declined to forfeit these proceeds because there was no offer of "evidence to show that the money paid to Giacalone was ever shared by others in the Detroit partnership," we find this conclusion by the district court to be clearly erroneous, certainly as to Vito Giacalone himself.

Giacalone pled guilty to the conspiracy allegations in count two, but count one charges were "realleged and incorporated by reference" in count two. Giacalone's activities with Vitello, acknowledged to have occurred by reason of his guilty plea, were related to the alleged purposes of the RICO conspiracy and his acts were ongoing and reflected continuity as discussed in the conspiracy principles section hereinabove. Even if the evidence supports a finding that Giacalone acted on his own in extorting money from Vitello, "it is not determinative that [he] committed the crime to further his own agenda, if indeed he was only able to commit the crime by virtue of his position with the enterprise." *Salinas,* 522 U.S. at 63, 118 S.Ct. 469. Thus, the district court clearly erred in

requiring that the government demonstrate that Giacalone shared with his co-conspirators the proceeds received from Vitello. The court should have assessed the forfeiture amount of $1,000,000 against Giacalone and Jack Tocco, jointly and severally.

vi. Unlawful gambling proceeds

Evidence as to these alleged payments or distribution of revenues from the Detroit enterprise to defendants springs primarily from Angelo Polizzi's testimony. Jack Tocco and Vito Giacalone, as partners, were identified as periodic recipients of unlawful gambling proceeds. As indicated above, Angelo Polizzi testified about information given him by his father Michael, also a partner in the Detroit Cosa Nostra. According to Angelo Polizzi, his father received periodic illegal gambling "draws" of between $700 and $1,000 per week in 1994. Further, Polizzi accompanied his father in delivering draws to other partners. The district court noted that there was a paucity of any corroborating evidence to support Polizzi's statements. The district court, therefore, declined "to use *30 years of weekly draws* as a basis for calculating an amount to be forfeited." (Emphasis added.)

Polizzi also testified that Christmas bonuses totaling $30,000 were paid to his mother for the benefit of his father while Michael was incarcerated (on the Nevada gambling casino matter). Sal Vitello also testified that he paid Giacalone substantial amounts annually as Christmas bonuses over many years. Because the district court found that there was insufficient proof that "Jack Tocco or Anthony Corrado benefitted from these payments made to

avoid labor problems," it declined to award forfeiture with regard to these payments to Giacalone.

Although this is a close issue, we affirm the decision of the district court in this regard, because the evidence regarding the amounts of these proceeds is speculative at best.[4] Our decision, it should be noted, is not based upon the district court's decision that any such draws or bonuses were not shown to have "benefitted" Jack Tocco. Rather, we find that the evidence was insufficient to calculate accurately a forfeiture award with respect to these proceeds.

E. Eighth Amendment

We have stated that any forfeiture award must comport with the Eighth Amendment prohibition against "cruel and unusual punishment" or "excessive fines." *See United States v. Sarbello,* 985 F.2d 716, 717-18 (3d Cir.1993) (holding that the mandatory statutory penalty may be reduced to conform to the Eighth Amendment). Though neither defendant has argued that the forfeiture sought by the government violates this constitutional provision, we are satisfied that there has been no Eighth Amendment violation under the circumstances of this case, particularly in light of the seriousness of the offenses charged and the great amounts of income derived through the activities of this enterprise over the years.

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[4] At p. 55 of the government's brief, there appears this statement: "The Government concedes that the exact computation of the amounts requested [in this regard] is difficult."

IV. SUMMARY

In conclusion, we reiterate that the district court clearly erred in holding that the proceeds from the illegal acts of Jack Tocco and Giacalone, which were proved beyond a reasonable doubt, must be traced directly back to each defendant in order to warrant a forfeiture of those proceeds. Section 1963(a) requires that the convicted defendant "shall forfeit" to the United States "any property constituting, or derived from, any proceeds which the person obtained, *directly or indirectly,* from racketeering activity or unlawful debt collection." (Emphasis added). Furthermore, "the amounts subject to forfeiture [need not] be directly linked or traced to the specific racketeering acts proved" where the RICO offense "is not merely the commission of particular predicate acts, but a conspiracy to 'conduct or participate, directly or indirectly, in the conduct of' an enterprise." *Faulkner,* 17 F.3d at 775 (quoting 18 U.S.C. § 1962(c)). In addition, co-conspirators in a RICO enterprise should be held jointly and severally liable for the reasonably foreseeable proceeds of the enterprise, and are not limited to amounts each defendant personally "obtained." *See United States v. Simmons,* 154 F.3d 765, 769-70 (8th Cir.1998). Though the district court indicated at the sentencing hearing and in his opinion that he would "consider appropriate fines" in sentencing these defendants, the fines ultimately imposed were against only Anthony Corrado and Jack Tocco for $140,131 and $94,447, respectively, amounts substantially less than any claimed forfeiture. Neither of these fines was adequate to take the place of the forfeitures sought. Indeed, in the absence of any forfeiture, the fines are very light considering these partners' conduct in the longstanding Detroit enterprise.

Accordingly, we REVERSE the district court and direct that forfeiture amounts be assessed against the following defendants in the respective amounts, jointly and severally:

1. Against *Vito Giacalone* in the amount of $234,700 (street taxes); plus $1,000,000 (extortion from Sal Vitello), for a total of $1,234,700. In addition, we direct a remand to the district court to determine under correct standards the degree and extent, if any, of Giacalone's forfeiture related to the sale of the Edgewater Hotel.

2. Against *Jack Tocco* in the amount of $234,700 (street taxes); plus $1,000,000 (extortion from Sal Vitello), for a total of $1,234,700. In addition, we direct a remand to the district court to determine under correct standards the degree and extent, if any, of Tocco's forfeiture related to the sale of the Edgewater Hotel.

286 F.3d 934

United States Court of Appeals,
Sixth Circuit.

UNITED STATES of America, Plaintiff-Appellant,

v.

Paul CORRADO; Jack W. **Tocco**; Vito W. Giacalone; Nove **Tocco**; Anthony J. Corrado, Defendants-Appellees.

No. 98-2315.

April 15, 2002.

Kathleen Moro Nesi, Asst. U.S. Attorney, Detroit, MI, for plaintiff-appellant.

Robert M. Morgan, Detroit, MI, Frank D. Eaman, Bellace & Beattie, Harper Woods, MI, Christopher A. Hostage, Terrance G. Reed, Reed & Hostage, Washington, DC, Neil H. Fink, Law Offices of Neil H. Fink, Birmingham, MI, Harold Z. Gurewitz, Margaret Raben, Gurewitz & Raben, Carole M. Stanyar, Detroit, MI, for defendants-appellees.

Before WELLFORD, NELSON, and GILMAN, Circuit Judges.

OPINION AND ORDER

WELLFORD, Circuit Judge.

On September 27, 2000, this court issued a decision in *United States v. Corrado,* 227 F.3d 543 (6th Cir.2000), and reversed the district court's order finding that the government was not entitled to any **forfeiture** amount against defendants Jack **Tocco** and Vito William Giacalone. Although defendants Paul Corrado, Nove **Tocco**, and

Anthony Corrado were joined as appellees in that appeal, we withheld our opinion as it pertained to them "pending the outcome of our remand of their related appeals." *Corrado,* 227 F.3d at 547. The "related appeals" referred to our decisions dated August 24 and September 8, 2000, in which we remanded those defendants' convictions for the district court to conduct a *Remmer* hearing and determine whether their trial was prejudiced by jury misconduct. *See United States v. Paul Corrado and Nove* **Tocco,** 227 F.3d 528 (6th Cir.2000); *United States v. Anthony Corrado,* Nos. 98-2394/99-1001, 2000 WL 1290343 (6th Cir. Sept. 8, 2000). On October 10, 2000, the district court conducted the ordered hearing and concluded that the jury was not tainted at the underlying trial, and, accordingly, reinstated the three convictions. That issue being resolved upon the remand, we now address the instant appeal pertaining to Paul Corrado, Nove **Tocco**, and Anthony Corrado. For the following reasons, we REVERSE as to these three defendants and remand Anthony Corrado's case for the reasons stated. Furthermore, we herein DENY the petition for rehearing filed by Jack **Tocco** and joined in by the other four defendants.

*I. **FORFEITURE** APPEAL PERTAINING TO PAUL CORRADO, NOVE **TOCCO**, AND ANTHONY CORRADO*

Most of the **forfeiture**-related issues raised against these defendants are identical in law and fact to the issues resolved in our former opinion pertaining only to Jack **Tocco** and Giacalone. We summarize the following conclusions made in our former opinion, which apply with equal force to Paul Corrado, Nove **Tocco**, and Anthony Corrado:

A. A criminal **forfeiture** award is a part of the defendant's sentence, not a part of the substantive offense of conviction. Thus, where the government alleges that the district court's award of **forfeiture** (or the determination of no **forfeiture**) was imposed in violation of the law, the government has the statutory authorization to appeal. *See Corrado,* 227 F.3d at 548-49; *see also* 18 U.S.C. § 3742(b).

B. Because the criminal **forfeitures** in this case constituted a part of the defendants' sentences, double jeopardy principles do not apply to prohibit the government from appealing the district court's **forfeiture** award as to any of the defendants. *Corrado,* 227 F.3d at 549-50.

C. The "shall forfeit" language of 18 U.S.C. § 1963(a) mandates that the district court assess **forfeiture** against the defendants when the facts support a finding of a sufficient nexus between the property to be forfeited and the RICO violation. *Id.* at 552.

D. Co-conspirators participating in a RICO enterprise should be held jointly and severally liable for any proceeds of the conspiracy reasonably foreseeable from conspiratorial operations. *Id.* at 553.

E. Unlike the general conspiracy statute, § 1962(d) requires no "overt or specific act" in carrying the RICO enterprise forward. Furthermore, "the supporters are as guilty as the perpetrators . . . so long as they share a common purpose, conspirators are liable for the acts of their co-conspirators." *Salinas v. United States,* 522 U.S. 52, 63-64, 118 S.Ct. 469, 139 L.Ed.2d 352 (1997). "[I]t is not determinative that the defendant committed the crime to further his own agenda, if indeed he was only able to commit the crime by virtue of his position within the

enterprise." *Id.* at 63, 118 S.Ct. 469; *see Corrado,* 227 F.3d at 552-54.

F. The government has met the "relationship plus continuity test," which requires the government to show that the predicate acts in connection with the conspiracy were related to its illegal purposes, and that these acts constituted a threat of ongoing criminal activity. *Corrado,* 227 F.3d at 554.

We must now apply these principles to the government's argument that the district court erred in its findings that the evidence was insufficient to support a **forfeiture** against Paul Corrado, Nove **Tocco**, and Anthony Corrado.

A. Paul Corrado and Nove **Tocco**

In our former opinion, we explained that the district court denied any **forfeiture** award against Paul Corrado and Nove **Tocco**, despite much evidence of recorded conversations between Nove and Paul regarding their collections of the $234,700 in street taxes. In attributing the amount of street taxes against Jack **Tocco** and Vito Giacalone, our opinion concluded that the district court erred in requiring the government to justify said **forfeiture** and prove that Nove and Paul shared their collections with the other partners. It was sufficient, in our view, that Nove and Paul were empowered by the larger organization in which Jack **Tocco** and Giacalone were members.

On this appeal, Paul and Nove claim that their collections of street taxes were not a part of the conspiratorial enterprise, but that the illegal activity was just between

the two of them and separate from the other conspirators. We have already rejected that position and have found that the collection of the street taxes was supported and made feasible by the larger organization. Therefore, for the reasons more fully explained in our former opinion, the district court erred in failing to hold Paul Corrado and Nove **Tocco** jointly and severally liable for the **forfeiture** of the $234,700 in street tax proceeds. *Id.* at 554-55.

B. Anthony Corrado

The government claimed that Anthony Corrado was jointly and severally liable with the other four defendants not only for the **forfeiture** of the $234,700 in street tax proceeds, but also that he was liable with Jack **Tocco** and Giacalone for the $4.2 million in profits in the conspiratorial enterprise allegedly received from the sale of two hotels in Las Vegas (the Frontier Hotel and the Edgewater Hotel), $1 million that the conspiracy extorted from Sal Vitello, and $38,400 it received in proceeds from the collection of unlawful gambling debts. Thus, the government sought a total **forfeiture** against Anthony Corrado in the amount of $5,473,100.

Consistent with our original opinion pertaining to Jack **Tocco** and Giacalone, we reject the government's contention with respect to the $1 million in proceeds related to the sale of the Frontier Hotel, because "there was no evidence that any of the defendants were personally involved, nor is there any evidence to corroborate the alleged statements made by Michael [Polizzi] and related to his son regarding the involvement of the enterprise." *Corrado,* 227 F.3d at 555. Also in accordance with our

earlier opinion, we remand to the district court to determine under correct standards the degree and extent, if any, of Anthony Corrado's **forfeiture** related to the sale of the Edgewater Hotel. *Id.* at 556. Finally, we reject the government's argument with respect to the $38,400 in unlawful gambling proceeds for the reasons explained in our original opinion. *Id.* at 557-58. Remaining for our review is the district court's decision not to hold Anthony Corrado liable for **forfeiture** amounts relating to the $234,700 in street tax proceeds (discussed above with respect to Paul Corrado and Nove **Tocco**), and the $1,000,000 that the conspiracy extorted from Sal Vitello.

With respect to the street taxes, we held that the collection of the street taxes was attributable to the criminal enterprise and, thus, we held Jack **Tocco** and Giacalone liable as members of that enterprise. The government argues that Anthony Corrado should also be held responsible as a "capo" of the enterprise, as the evidence of his participation in the enterprise was proven beyond a reasonable doubt. We agree with the government and now hold that Anthony Corrado should be held liable for the $234,700 in collected street taxes.

As we stated in our opinion, "[t]he government should not have been required to prove that Nove and Paul shared their collections with other partners. Nor was it required to show the proportion of sharing or to trace these extortionate collections back to each member. The entire illegal scheme could not have succeeded were it not for the support, or the use of the name and the reputation of, the conspiratorial enterprise." *Id.* at 555. Furthermore, we noted that "[r]ecorded conversations between Nove and Paul indicate that they were working with (or for), or were

empowered by, the 'capos' Jack **Tocco** and Anthony Corrado." *Id.* Because the evidence showed that Anthony Corrado was a member of the conspiratorial enterprise that empowered the collection of the street taxes, we hold him liable for the **forfeiture** of the proceeds from that illegal endeavor.

We also find that, because of his involvement in the enterprise, Anthony Corrado should be held liable for the $1,000,000 extorted from Sal Vitello. Though the district court was of the view that **forfeiture** was not required where there is no showing that extortion money was ever actually shared by the partnership, we held that the government need only show that Giacalone was empowered by his membership in the enterprise. Consequently, because of Anthony Corrado's involvement as a member in the enterprise, the district court erred in failing to assess against him a **forfeiture** amount of $1,000,000 attributable to the extortion from Sal Vitello.

Accordingly, we find that the district court erred in failing to assess against Anthony Corrado **forfeiture** amounts of $234,700 in street tax proceeds and $1,000,000 for the extortion from Sal Vitello. In addition, we REMAND to the district court to consider, along with the cases pertaining to Jack **Tocco** and Vito Giacalone, the degree and extent, if any, of Anthony Corrado's **forfeiture** related to the sale of the Edgewater Hotel.

II. PETITION FOR REHEARING

We now consider the petition for rehearing filed October 23, 2000, by Jack William **Tocco**, joined by the other four defendants, and the government's response thereto.[1] We have carefully considered the issues presented in the petition for rehearing and the full response by the government, and we conclude that the petition to rehear must be denied.

Jack **Tocco**'s brief raises no new issues not previously treated. We do not presume that the Supreme Court intended to overrule *Monge v. California,* 524 U.S. 721, 118 S.Ct. 2246, 141 L.Ed.2d 615 (1998), by its decision in *Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). *One Lot Emerald Cut Stones v. United States,* 409 U.S. 232, 93 S.Ct. 489, 34 L.Ed.2d 438 (1972), cited by defendant Jack **Tocco** in his brief in support of his double jeopardy argument, simply holds that acquittal in a criminal **forfeiture** proceeding does not bar a subsequent civil **forfeiture** proceeding against the same illegally smuggled goods. *United States v. Ursery,* 518 U.S. 267, 116 S.Ct. 2135, 135 L.Ed.2d 549 (1996), also cited by Jack **Tocco** in this respect, holds that separate later civil **forfeiture** proceedings are not bound by double jeopardy principles following a criminal conviction for the same underlying illegal conduct because civil **forfeiture** does not constitute punishment. *Id.* at 274, 116 S.Ct. 2135. ("Since the earliest years of this Nation, Congress has authorized the Government to seek parallel *in rem* civil

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[1] We granted the requests of the other defendants to join in Jack **Tocco**'s petition and amended petition despite objections filed by the government.

forfeiture actions and criminal prosecutions based upon the same underlying events."). The Court in *Ursery* adds:

> Requiring the **forfeiture** of property used to commit federal narcotics violations encourages property owners to take care in managing their property and ensures that they will not permit that property to be used for illegal purposes. See *Bennis v. Michigan*, 516 U.S. 442, 452, 116 S.Ct. 994, 134 L.Ed.2d 68 (1996) ("**Forfeiture** of property prevents illegal uses . . . by imposing an economic penalty, thereby rendering illegal behavior unprofitable") . . . .

518 U.S. 267, 290, 116 S.Ct. 2135, 135 L.Ed.2d 549.[2]

Neither of these cases, in our view, supports the argument of the defendants. We discussed fully the inapplicability of *Apprendi* in our earlier opinion, and we do not further speculate or surmise as to its future implications in the event this particular double jeopardy issue reaches the Supreme Court in light of its prior precedent. *Apprendi,* suffice it to say, involves a different issue, and is not controlling under the facts of this case.

On the other hand, the government cites *United States v. Bajakajian,* 524 U.S. 321, 118 S.Ct. 2028, 141 L.Ed.2d 314 (1998), a case in which the Supreme Court considered the government's appeal of an adverse criminal **forfeiture** assessment based on Eighth Amendment proportionality principles. The Court noted that "the

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[2] In *Ursery,* Justices Scalia and Thomas stated that "the Double Jeopardy Clause prohibits successive prosecution, not successive punishment." *Id.* at 297, 116 S.Ct. 2135.

forfeiture of respondent's currency constitutes *punishment* and is thus a 'fine' within the meaning of the Excessive Fines Clause." *Bajakajian,* 524 U.S. at 334, 118 S.Ct. 2028 (emphasis added); *see also United States v. Christunas,* 126 F.3d 765, 768 (6th Cir.1997) (determining that a preliminary **forfeiture** order was appealable, but focusing on whether the order was final for purposes of appeal); and *United States v. Investment Enterprises, Inc.,* 10 F.3d 263, 270 (5th Cir.1993) (holding specifically that "[a] review of the [Sentencing] Guidelines Manual and the relevant statutory provisions, however, lead us to conclude that a **forfeiture** order is a 'sentence' for purposes of § 3742(b) and thus is appealable"). This authority confirms our view that **forfeiture** is akin to a fine and punishment and therefore is not subject to double jeopardy constrictions.

We conclude that other asserted bases for rehearing on the **forfeiture** questions have been covered in our prior decision, and the defendants have raised no new and material issues for further consideration.

Accordingly, we OVERRULE and DENY the petition for rehearing as to all defendants.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

D-1 JACK WILLIAM TOCCO,
D-5 VITO WILLIAM GIACALONE,
D-6 ANTHONY JOSEPH CORRADO,
D-8 NOVE TOCCO, and
D-9 PAUL CORRADO
(son of Dominic Corrado),

Defendants.
_____/

No. 96-CR-80201
Hon. John Corbett O'Meara

(Filed Oct. 23, 1998)

OPINION AND ORDER REGARDING FORFEITURE

After guilty verdicts against the defendants here (except for Vito William Giacalone, who pleaded guilty), the parties stipulated to allow the court to make forfeiture findings.

Before the court is the government's June 12, 1998 motion for entry of forfeiture judgment. Defendants Jack William Tocco, Vito William Giacalone, Anthony Joseph Corrado, and Paul Corrado filed separate responses June 26, 1998. Defendant Nove Tocco filed a motion to join in his co-defendants' responses June 29, 1998. The government submitted a reply July 9, 1998. The court heard oral argument August 31, 1998, and took the matter under advisement.

On January 5, 1998, Vito Giacalone pleaded guilty to RICO conspiracy violations. His Rule 11 plea agreement[1] with the government contained a provision which, in effect, made him subject to any forfeiture order affecting those defendants who stood trial.[2] On April 29, 1998, defendants Jack William Tocco, Anthony Joseph Corrado, Nove Tocco, and Paul Corrado were convicted, *inter alia,* of two counts of RICO conspiracy. The RICO counts charged in the indictment included forfeiture claims.

I. LAW AND ANALYSIS

A. The Standard

The government seeks forfeiture in the total amount of $7,715,554 related to the RICO conspiracy violations and pursuant to 18 U.S.C. § 1963(a)(3), which provides for the forfeiture of "any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962." In *Libretti v. United States,* 516 U.S. 29, 38-39 (1995), the United States Supreme Court held that criminal forfeiture is punishment, and therefore part of a defendant's sentence, and not part of the conviction. Subsequently, courts have held that because criminal forfeiture is part of a defendant's sentence, the government's burden of proof is the lesser preponderance of the evidence standard, rather than the

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[1] Not yet accepted by the court.

[2] "In the event that a jury finds the co-defendants of the defendant in this indictment subject to criminal forfeiture, nothing in this agreement will limit the defendant's liability." Vito Giacalone plea agreement at 6.

beyond a reasonable doubt standard. *See, e.g., United States v. Defries,* 129 F.3d 1293, 1312 (D.C. Cir. 1997); *United States v. White,* 116 F.3d 948, 950 (1st Cir. 1997). Therefore, the government must show, by a preponderance of the evidence, that value derived from illegal activity (racketeering or illegal debt collection) was obtained by the defendant or defendants in some quantified amount which can be calculated.

B. The Conclusion: The Evidence does not Provide a Sufficiently Quantified Factual Basis for Forfeiture.

The government alleges that defendants obtained property in the following illegal ways: 1) receipt of weekly draws derived from illegal gambling, 2) receipt of Christmas bonuses also so derived, 3) proceeds of sale of illegal ownership interests in two Nevada hotels, 4) extorted payments from Silverio Vitello to Vito Giacalone, and 4) collections of "street tax" by Nove Tocco and Paul Corrado.

If the guilty verdicts on the RICO charges in the indictment are to be understood, they must stand for the proposition that the eleven person organized crime group[3] described by Angelo Polizzi as a "partnership" (hereinafter sometimes referred to as the "Detroit partnership") is the continuing criminal conspiracy upon which the guilty

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[3] Angelo Polizzi testified that members were Jack William Tocco, Anthony Joseph Tocco, Anthony Joseph Corrado, Vito William Giacalone and seven others. February 18, 1998 trial tr. at 134. Defendants Nove Tocco and Paul Corrado (son of Dominic Corrado) were described as associates rather than partners.

verdicts were based and upon which verdicts the government here seeks forfeiture.

The provisions of 18 U.S.C. § 1963(a)(3) providing for the forfeiture of "any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962" are broad in intent and have been interpreted broadly. *See, e.g., Russello v. United States,* 464 U.S. 16, 26-27 (1983); *United States v. Defries,* 129 F.3d 1293, 1315 (D.C. Cir. 1997); *United States v. Hurley,* 63 F.3d 1, 21 (1st Cir. 1995); *United States v. Argie,* 907 F.2d 627, 629 (6th Cir. 1990). However, they are not without their limits, not the least of which are those provided by the Excessive Fines Clause of the Eighth Amendment.

While the jury found each of the defendants (except Vito William Giacolone, who pleaded guilty) guilty of participation as co-conspirators in an illegal activity in violation of RICO, it did so based on evidence so disparate in time and nature to have, in the court's opinion, rendered it impossible make [sic] a rationally quantified finding of fact that the partners and associates in the Detroit partnership obtained anything sufficiently determinable in degree of value to allow the calculation of an amount for forfeiture.

At sentencing, the court will consider appropriate fines.

It will here briefly discuss each of the factual bases upon which the government seeks forfeiture.

1. Weekly Draws and Christmas Bonuses

The government's evidence regarding the weekly draws is based primarily on the testimony of Angelo Polizzi, who testified that his father Michael Polizzi told him that he was a member of the organized crime group in Detroit which included as "partners" the defendants Jack William Tocco, Anthony Joseph Tocco, Anthony Joseph Corrado and Vito William Giacalone. February 18, 1998 trial tr. at 52-53. Polizzi testified that as a result of his father's partnership interest in the group, his father received "draws" which were the proceeds of illegal gambling. *Id.* at 140, 171-72. He further testified that his father was receiving between $700 and $1,000 per week as his draw when he told him this in 1994. *Id.* at 172-73. Finally, Polizzi testified that on some occasions he accompanied his father, delivering the draws to his partners. *Id.* at 172-73.

Defendants argue that the government produced insufficient evidence to prove, by the preponderance of the evidence, that defendants Jack Tocco, Anthony Corrado, and Vito Giacalone received weekly draws of monies obtained illegally. After years of surveillance and wiretaps, it is argued, the government failed to produce any receipt deposit slip. bank statement or other piece of paper identifying that any proceeds were obtained by these defendants. Therefore, the government's forfeiture case rests upon the testimony, and hence the credibility, of its witnesses. The court, it is further argued, replacing the jury as finder of fact, must weigh this credibility.

Aside from Polizzi's testimony as to what his father told him in 1994, there was no other testimony regarding the payments, or lack of payments, which may, or may

not, have been forthcoming at other times during the 30 years the government would like to use as a multiplier for the purpose of calculating a forfeiture amount. Polizzi did not testify (nor did any other witness) about all the other partners and what amounts they may have received. Polizzi did not testify (nor did any other witness) that his father told him that the weekly draw had been in effect for 30 years or for any particular length of time, for that matter.

Thus, this court is unable to find, by a preponderance of the evidence, that over the course of 30 years, defendants Jack Tocco, Anthony Corrado, and Vito Giacalone all received the same amount at the same time as Michael Polizzi told his son he had received payments, or any other amounts at any other times. Therefore, the court declines to use 30 years of weekly draws as a basis for calculating an amount to be forfeited.

The government's evidence regarding Christmas bonuses is similarly based on the testimony of Angelo Polizzi, who testified that when his father was incarcerated in 1976 and unable to collect his Christmas bonus, Anthony Joseph Tocco, a defendant acquitted of all charges, gave Angelo Polizzi $10,000, which he was instructed to turn over to his mother. *Id.* at 174. Polizzi testified that he also received $20,000 in 1987 to be given to his mother as a Christmas bonus. *Id.* at 174-75. The government contends that the receipt of Christmas bonuses is corroborated by the testimony of Silverio Vitello, who testified that he gave Vito Giacalone between $15,000 and $35,000 each year as a Christmas bonus. March 31, 1998 trial tr. at 65-66.

The government urges the court to conclude that if Michael Polizzi received an average of $15,000 a year in Christmas bonuses over the course of 30 years, defendants Jack Tocco, Anthony Corrado, and Vito Giacalone did as well. At best, Polizzi's testimony accounts for payments totaling $30,000 paid to his father while he was incarcerated.

In fact, Vitello's testimony does not corroborate that of Angelo Polizzi. Vitello testified that he paid Christmas bonuses to Vito Giacalone in addition to regular payments which were supposed to stave off labor problems. The government presented no evidence to tie those payments to the RICO conspiracy as alleged in the indictment or to establish that Jack William Tocco or Anthony Joseph Corrado (or other purported members of the conspiratorial group) benefitted from these payments made to avoid labor problems.

Polizzi said the monthly draws and Christmas bonuses were payments made from illegal gambling proceeds.

The court finds no sufficient Evidence supports the Christmas bonus calculation and declines to use such evidence to calculate an amount to be forfeited.

Generally, the chronological span of 30 years upon which the government asks this court to base a forfeiture order calculated from putative weekly draws and Christmas bonuses almost defines its own inadequacy. The court hastens to emphasize that it in no way criticizes the government (and notes the difficult burden it successfully carried related to the underlying guilty verdicts) when it says the government falls short of its necessary preponderance when it calculates a total of $5,328,000, Gov't

brief at 10, to be forfeited based only on what Angelo Pollizi's father told him was the weekly draw in 1994 and upon Angelo Pollizi's very limited personal interface with the delivery of weekly draws and receipt of Christmas bonuses. Were the weekly draws always from $700 to $1,000? Were they the same for all partners? Were they perhaps less in 1970 than they were in 1994? Did someone who was incarcerated (as was Michael Polizzi on two occasions) receive more? or less? of a weekly draw or Christmas bonus? Were all these putative draws and bonuses derived, as Angelo Pollizi testified, from "illegal gambling"? *Only* from illegal gambling? From *what* illegal gambling? It is not described by the evidence. And ultimately, can the draws and Christmas bonuses evidence support the calculation of any rationally based amount of money to be forfeited?

The court believes that the lack of evidence with regard to any specific illegal activity from which were the source of the weekly draws and Christmas bonuses (except that they were derived from "illegal gambling"), coupled with the lack of specificity with regard to the receipt of funds and the amount of funds which might have been received by individual members or associates of the Detroit partnership, inadequately supports a forfeiture judgment.

2. Hotel Ownership

Frontier Hotel

The government introduced evidence to show that the defendants had held hidden ownership interests in two Nevada hotels which were subsequently sold, the Frontier Hotel and the Edgewater Hotel. Michael Polizzi was

convicted in 1974 for conspiracy to obtain a hidden ownership interest in the Frontier. February 18, 1998 trial tr. at 53, 69, 73, 132-33; Gov't Ex. 106. Angelo Polizzi testified that the hotel was sold to Howard Hughes for a $1,000,000 profit and that Michael Polizzi and his partners each received unspecified shares of proceeds from the sale. *Id.* at 142-43.

This involvement in the Frontier Hotel was not connected to the Detroit partnership in any way except through one of the member's (Michael Polizzi's) involvement.

The evidence offered by the government is inadequate as a basis upon which to calculate an amount for forfeiture to be imposed on these defendants.

Edgewater Hotel

FBI Special Agent Samuel Ruffino testified that in 1982 he overheard a conversation between Anthony Corrado, Vito Giacalone, and William Pompili in which they discussed the sale of their interest in the Edgewater Hotel. March 2, 1998 trial tr. at 54-89. Ruffino testified that the trio alluded to proceeds they received from the sale of the hotel as "$800,000 and $1.6 million dollars [sic] and having another $800,000 on December 31st." *Id.* at 56. The amounts total $3.2 million, the value of the defendants' ownership interest in the Edgewater as estimated by Clifton C. Cooper, an employee of the Nevada Gaming Board. February 24, 1998 trial tr. at 102.

Here again, the involvement in the Edgewater Hotel was not connected to the Detroit partnership in any way except through the participation of members Anthony

Corrado and Vitô William Giacalone. No evidence suggests that any other members of the Detroit partnership participated in or benefitted from holding or conspiring to hold illegal positions in Nevada gambling enterprises. The implicit suggestion that once one has been found to be a member of a continuing criminal enterprise in violation of RICO, any illegal activity that person may undertake whether in furtherance of the RICO conspiracy or not is chargeable to other members of the RICO conspiracy is rejected.

The government has failed to show, by a preponderance of the evidence, that the Detroit partnership received and distributed among themselves any amount of money or other valuable thing derived from the sale of the Edgewater Hotel.

The Hotel Interests Generally as a Basis for Forfeiture

A further basis for not using the purported proceeds from illegal ownership positions in Nevada hotels as part of any calculation for the purpose of forfeiture is that the forfeiture provisions of the indictment (which contemplated forfeiture of money obtained through illegal gambling and collection of illegal debts) do not provide notice to the parties that the government intends to seek forfeiture based upon proceeds from the sale of ownership positions in Nevada hotels. The court points out that the gambling activity carried on by these hotels was not illegal. The illegality relied upon by the government in presenting evidence of defendants' holding ownership positions in these hotels was that to hold and incompletely disclose those positions violated criminal provisions of Nevada law.

3. Vitello Payments to Vito Giacalone

Silverio Vitello testified that he paid Vito William Giacalone $1,000 per week for approximately 10 years to assure labor peace. March 31, 1998 trial tr. at 64-65. In addition, he said he gave Giacalone random cash payments and Christmas bonuses. *Id.* at 65-66. He concluded that he had paid, in total, about $1,000,000 to Giacalone. *Id.* at 101.

The government offered no evidence to show that the money paid to Giacalone was ever shared by others in the Detroit partnership and declines to order forfeiture based on this evidence.[4]

4. Street Tax

Evidence of Nove Tocco and Paul Corrado's collection of a "street tax" is found in tape recorded conversations of the two and corroborated by their targets. In an October 7, 1992 conversation, they stated they were "generating about a hundred thousand dollars a year off the street." Gov. Ex. 446A. Robert Monro testified that he started making payments of $1,000 each month to the two in April 1991. March 9, 1998 trial tr. at 162. The amount was subsequently raised to $1,000 twice a month. *Id.* Ramzi Yaldoo testified that he paid them $1,100 per month from

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[4] The terms of Vito William Giacalone's Rule 11 Plea Agreement appear to make his liability for forfeiture derivative of forfeiture amounts imposed upon co-defendants. Whether or not this is so, the court finds that amounts paid by Vitello to Giacalone are unsupported by evidence tracking all or part of those payments to the Detroit partnership.

July 1992 until July 1995. March 16, 1998 trial tr. at 96-101. George Yatooma testified that he paid them $1,500 per month from August 1992 until July 1995. March 23, 1998 trial tr. at 30-35.[5]

Here again, the record is empty of any suggestion that the Detroit partnership "derived" anything from Nove Tocco and Paul Corrado's illegal street activity. On the contrary, throughout the hours of recorded conversations, there are repeated suggestions that members of the Detroit partnership are not involved in these activities and are displeased with them.

Because of this, the court concludes that whatever monies Nove Tocco and Paul Corrado collected will not support a forfeiture arising out of convictions of these defendants for participating in the illegal activities of the Detroit partnership. Rather, they are properly the basis for consideration at the sentencings of Nove Tocco and Paul Corrado.

II. CONCLUSION

The court concludes that it must, to support an appropriate forfeiture finding and judgment, be able to calculate from the evidence a sufficiently quantified value

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[5] The court points out that the testimony of Monro, Yaldoo and Yatooma concerning dollar amounts paid over different periods of time is the extent of quantification by victims of "street tax" paid. The only other such quantification by victims of amounts paid to satisfy extortionate demands is that of Vitello's payments to Vito William Giacalone and of Harold Stern's payment of $50,000 to Anthony Giacalone in 1977, this last being a basis for calculating receipts the government does not rely upon in its brief.

of property *deriving* from the illegal activity for which forfeiture is sought and determine, by a preponderance, that that property was somehow delivered into the hands of the defendant co-conspirators, that is, that they *obtained* it.[6] This, the court believes, is the minimum required for an appropriate joint and several forfeiture judgment. Beyond this, there could be questions of proportionality and other Eighth Amendment issues of excessiveness. But the court concludes it need not reach these latter issues here because the evidence does not support with sufficient quantification of value either the amounts of property at derivation or the movement of a quantified amount of property to a destination (or destinations).

Again the court wants to assert strongly that its failure to find facts supporting forfeiture in this case in no way should be viewed as criticism of the government's presentation of its case. Rather, it reflects the fact that the government succeeded in the difficult task of obtaining guilty verdicts from a jury based upon evidence spanning three decades and relating to the activities of a large number of people. Some of those activities, as the jury has concluded, were conducted in concert and for illegal purposes in violation of RICO. Some of them were not. The

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[6] The court holds that *both* a rationally determinable amount of value sourced to illegal activity *and* the realization of all or part of that value by the defendant(s) must be supported by a preponderance of the evidence for a forfeiture judgment to be entered. Here, with relatively minor exceptions (see note 5), the record does not allow any rational determination of amounts sourced to illegal activity and is substantially devoid of evidence that one, or more, or all, defendants realized (or *obtained*, in the language of the statute) all or part of any value sourced to illegal activities.

proceeds of the illegal activity upon which the jury based its guilty verdicts were insufficiently sourced to the illegal activities upon which the RICO convictions were based and insufficiently tracked into the hands of the co-conspirators or the individual defendants involved here for the court to make any forfeiture award.

Consistent with *Libretti,* the court believes these issues can and should be more appropriately dealt with as part of the sentencing phase of these proceedings in connection with consideration of appropriate fines, if any. The court intends to do so.

The court finds the evidence does not support the government's request for a forfeiture judgment.

Motion for such judgment **DENIED.**

SO ORDERED.

It is further **ORDERED** that, to the extent defendants have withheld financial information awaiting this ruling on forfeiture, such information will be furnished forthwith to the Probation Department for inclusion in the defendants' respective Pre-sentence Investigation Reports.

/s/ John Corbett O'Meara
John Corbett O'Meara
United States
District Judge

Date: October 23, 1998